***United States Court of Appeals***

***for the Second Circuit***

# APPENDIX

76-4068

IN THE

UNITED STATES

# COURT OF APPEALS

FOR THE SECOND CIRCUIT

## No. 76-4068

MOHAWK EXCAVATING, INC.

Petitioner,

versus

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, UNITED STATES DEPARTMENT OF LABOR, ET AL.

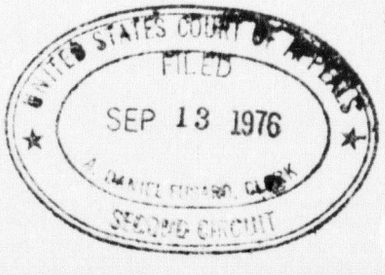
Respondent.

B
P/S

ON PETITION FOR REVIEW OF AN ORDER OF THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

[redacted]

FIRST APPENDIX




September, 1976

TABLE OF CONTENTS
to
FIRST APPENDIX

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
6525 BELCREST ROAD, SUITE 1005
HYATTSVILLE, MARYLAND 20782
(301) 436-8870

October 9, 1975

NOTARY

Albert H. Ross, Regional Solicitor
JFK Federal Building, Room 1607
Boston, Massachusetts 02203
Attn: Paul J. Katz, Esq.

Weber and Marshall
24 Cedar Street
New Britain, Connecticut 06052
Attn: Thomas C. Marshall, Esq.

Re: Secretary of Labor v. Mohawk Excavating, Inc.;
OSAHRC Docket No. 8845

Gentlemen:

Please find enclosed a copy of my Decision in the referenced case.

Pursuant to the Commission's new procedures, effective December 15, 1974, this Decision together with the official files have this date been forwarded to the Commission.

You will note that the Commission considers this Decision "filed" twenty days in the future. Thus the Decision bears this future "filing" date. The "filing" date is then used to compute the 30 day period for review set forth at 29 U.S.C. 661(i).

Very truly yours,

William E. Brennan
WILLIAM E. BRENNAN
Judge, OSAHRC

cc: Docket No. 8845

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

## NOTICE OF DECISION

Secretary v. Mohawk Excavating, Inc.
OSAHRC Docket No. 8845

1. Enclosed herewith is my decision in the above entitled case. It will be filed on October 29, 1975, and will become the final order of the Commission pursuant to 29 U.S.C. §661(i) on November 28, 1975 unless a member of the Commission directs that it be reviewed. Parties will not receive any further communication from the Commission unless it is directed for review (see Paragraph 4 below).

2. You may petition for review of this decision by the Commission. Such a petition must be submitted in quadruplicate. In order to assure careful consideration thereof it should be sent to me so that it can be incorporated with my decision and filed with it on October 29, 1975. Petitions will be accepted after that filing date, but there is no guarantee that there will be sufficient time to fully consider them. The final order date is statutory and cannot be extended under any circumstances.

3. Petitions for review submitted prior to the above noted filing date should be sent to me at the address below. Those submitted after the filing date should be mailed to

Richard Schiffmann, Chief Review Counsel
Occupational Safety and Health Review Commission
1825 K Street, N.W.
Washington, D.C. 20006

4. Should review be granted by a member of the Commission, each party to this case will be notified and each will be given an opportunity to submit a brief to the members prior to their final disposition of the case.

5. It would be appreciated if you would execute the enclosed postcard and mail it at once so that your present intention on seeking review of this decision may be known. It does not bind you in any way, but is used only to project future workload.

William E. Brennan
WILLIAM E. BRENNAN
Judge, OSAHRC

DATE: October 9, 1975

OSAHRC FORM NO. 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR | : | |
| Complainant | : | |
| v. | : | DECISION AND ORDER |
| MOHAWK EXCAVATING, INC. | : | OSAHRC Docket No. 8845 |
| Respondent | : | |

APPEARANCES:

FOR THE SECRETARY OF LABOR

Albert H. Ross, Regional Solicitor
Attn: Paul J. Katz, Esq.
U. S. Department of Labor

FOR THE RESPONDENT

Weber and Marshall
Attn: Thomas C. Marshall, Esq.

Brennan, W.E.; A.L.J.

This action arises under the provisions of Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 659(c) (hereinafter the Act), to review a Citation for Nonserious Violations of Section 5(a)(2) of the Act, 29 U.S.C. 654(a)(2) and penalties proposed thereon issued pursuant to Sections 9(a) and 10(a) of the Act, 29 U.S.C. 658(a) and 659(a) by the Secretary of Labor through the Area Director of the Occupational Saftey and Health Administration for Hartford, Connectiuct (hereinafter Complainant), to Mohawk Excavating, Inc., Newington, Connecticut (hereinafter Respondent), following an inspection of kespondent's worksite, a sewer trench located on Westerly Drive in Enfield, Connecticut (hereinafter worksite).

On June 6, 1974, Occupational Safety and Health Administration Area Director Harold Smith inspected a trench on Westerly Drive in Enfield, Connecticut which had been excavated by Respondent and in which it was installing sewer pipe. As a result of this inspection, Mr. Smith on June 25, 1974, issued a Citation for alleged Nonserious Violations of the Occupational Safety and Health Standards set forth at 29 C.F.R. 1926. 652(b) - Item No. 1 and 1926.652(h) - Item No. 2 as well as a Notification of Proposed Penalties of $75 for each alleged violation (R.p.1,2).

Respondent filed a timely Notice of Constest to the Citation and proposed penalties (R.p.3).

Thereafter a Complaint was duly filed as was Respondent's Answer thereto (R.p.5,6).

Respondent thereafter through its counsel filed what it denominated its "Affirmative Defense to Complaint", (R.p.7) which attacked the constitutionality of both the Act and the Standards on the grounds of deprivation of due process of law, equal protection, trial by jury, and the right to confront one's accusers and other rights and guarantees as set forth in the Fifth and Sixth Amendments to the United States Constitution." (R.p.7).

On January 8, 1975, Respondent, through its counsel, filed a Motion for Dismissal, which in eight pages set forth its arguments in support of its constitutional challenge to both the Act and Standards promulgated thereunder (R.p.J-9). This Motion was Denied by Order of the undersigned dated January 31, 1975 (R.p.J-1).

Respondent's Motion for approximately a one month postponement of the trial herein, because of counsels vacation plans and to await the en banc decision of the U.S. Circuit Court of Appeals for the Third Circuit in the case of Frank Irey, Jr., Inc. v. OSHA and Secretary of Labor, (which raised constitutional issues substantially the same as Respondent raises in this case) (R.p.J-2), was granted (R.p.J-3).

The trial herein was finally convened on March 27, 1975, in Hartford, Connecticut, pursuant to prior notice. At the beginning thereof, Respondent submitted a Motion for Trial by Jury (R.p.J-7) which was denied (Tr.11). In addition it renewed its prior Motion for Dismissal upon constitutional grounds and the prior ruling denying this Motion was confirmed (TR.12).

On May 1, 1975, pursuant to prior notice (TR. 263, R.p.J-9, J-10) this trial was continued at Springfield, Massachusetts, being completed that

day. Both parties herein appeared through counsel. No affected employees or representatives thereof desired party status.

Posthearing briefs were ultimately received from both parties by August 31, 1975 (R.p.J-19, J-22).

Having considered the entire record herein, the testimony and demeanor of the witnesses, the exhibits, stipulations, representations and admissions of the parties, it is concluded that the substantial, reliable and probative evidence of this record considered as a whole supports the following findings of fact and conclusions of law.

After the conclusion of this trial, the U. S. Court of Appeals for the Third Circuit, on July 24, 1975, filed its en banc opinion in Frank Irey, Jr., Inc. v. OSHRC and Secretary of Labor, ___F2d___, (CA 3, 1975, No. 73-1765) after rehearing. Substantially all of the constitutional attacks upon the Act and OSHA Standards, raised in this case, are answered in the Irey opinion, supra. Those constitutional arguments of Respondent herein, not answered in Irey, supra, have been answered in the recent cases of Atlas Roofing Company, Inc. v. OSHRC, ___ F2d ___, (CA 5, 1975 - No. 73-2249, September 8, 1975) and Lake Butler Apparel Company v. Secretary of Labor, ___ F2d ___ (CA 5, 1975 - No. 73-3518, September 15, 1975).[1/]

---

[1/] For additional opinions dealing with the constitutionality of the Act see: Beall Construction Co. v. OSHRC et al., 507 F2d 1041 (CA 8, 1974); American Smelting & Refining Co. v. OSHRC; 501 F2d 504, 515 (CA 8, 1974); McLean Trucking Co. v. OSHRC et al., 503 F2d 8 (CA 4, 1974); Bloomfield Mechanical Contracting, Inc., et al. v. OSHRC et al., ___F2d___, (CA 3, 1975, No. 74-1485, August 11, 1975) and cases cited at p. 13, Slip opinion.

In light of the holdings in the authorities cited supra, essentially that the Act does not offend constitutional rights and guarantees, Respondent's defense to this action, on those grounds, must fail.

The following matters were stipulated to or admitted in pleadings or pretrial discovery responses.

The Respondent is a Connecticut corporation with its principal office located at 240 Stamm Road, Newington, Connecticut. It employs a total of about 32 employees in its business of sewer construction. With gross revenues in 1974 of approximately three million dollars, it classifies itself as a medium sized company in the heavy construction industry. No injuries are associated with this case.

Although its sewer installation business is conducted exclusively within the State of Connecticut, it owns and operates construction equipment and purchases other materials and supplies which are manufactured outside that State and some of its work projects are funded, in whole or in part, by the Federal Government.

Based upon these admitted facts it is concluded that Respondent is an employer having employees and is engaged in a business affecting commerce within the meaning of Section 3(5),(6) of the Act, 29 U.S.C. 652(5),(6). Further, upon Respondent's filing its timely Notice of Contest herein, the Review Commission has jurisdiction herein pursuant to Section 10(c) of the Act, 29 U.S.C. 659(c).

The Citation for alleged Nonserious Violations issued to the Respondent herein on June 25, 1974 sets forth the following:

| Standard Allegedly Violated | Description of Alleged Violations | Abatement Date |
|---|---|---|
| Item No. 1<br>29 CFR 1926.652(b) | Employer failed to assure that sides of trenches in unstable or soft material, 5 feet or more in depth, shall be shored, sheeted, braced, sloped, or otherwise supported by means of sufficient strength to protect the employees working within them. Location: Trench box not to bottom of trench. It was 3'3" from base. | immediately upon receipt of citation |
| Item No. 2<br>29 CFR 1926.652(h) | Employer failed to assure that when employees are required to be in trenches 4 feet deep or more, an adequate means of exit such as a ladder or steps, shall be provided and located so as to require no more than 25 feet of lateral travel. Location: Trench at Westerly Drive, Enfield, Ct. | immediately upon receipt of citation |

A penalty of $75 for each alleged violation was proposed.

The cited Standards in pertinent part provide:

Item No. 1

29 C.F.R. 1926.652(b)

Sides of trenches in unstable or soft material, 5 feet or more in depth, shall be shored, sheeted, braced, sloped, or otherwise supported by means of sufficient strength to protect the employees working within them. See Tables P-1, P-2 (following paragraph (g) of this section).

Item No. 2

29 C.F.R. 1926.652(h)

When employees are required to be in trenches 4 feet deep or more, an adequate means of exit, such as a ladder or steps, shall be provided and located so as to require no more than 25 feet of lateral travel.

This vigorously litigated case involves a trench, at the previously identified worksite, with the following dimensions, 35 feet long, 14 feet 5 inches deep, and approximately 8 feet wide at the top or ground level and 5 feet wide at the bottom.[2/]

When Area Director Smith arrived at this trench two of Respondent's employees were working in the bottom of it leveling crushed stone upon which was to be installed a section of 18 inch diameter sewer pipe as part of the sewer system being installed by Respondent. Also within this trench, at the location where the two employees were working, Respondent had installed a large "trench box", technically defined as a "Trench Shield" at 29 C.F.R. 1926.653(p). The trench box in question was 16 feet long, its sides were 10 feet high and it weighed from 6 to 7 tons. Its sides were heavily constructed of steel plates which were braced vertically and horizontally with steel girders or "I" beams. The two sides were braced apart, horizontally by a very large steel beam on its forward end, and two heavy adjustable round steel braces at its aft end. As used by the Respondent generally, and specifically in this trench, the sides of this trench box are fixed at a slight "v" angle, so that the box is slightly wider at its top than at its bottom. Along the top of each side of this box, railroad rails had been installed. The bottom of each side is wedged shape. The box is placed in the excavated trench and then is driven into place by a large, 40 ton back hoe, which applies the downward force to the railroad rails on the top of each side. The bottom of the sides of the

---

[2/] Complainant's characterization of this excavation as a "trench" comports with the Standard's definition thereof at 29 C.F.R. 1926.653(n).

box are thus driven to a level approximately 1 foot above that elevation at which the sewer pipe to be installed will occupy.

In this case, 6 inches of crushed stone or rock was installed or was to be installed pursuant to the construction contract, under the 18 inch diameter sewer pipe. Once the pipe was installed, 9 inches more of crushed stone was to be installed on either side of the pipe to form a bed for the pipe to prevent its movement. Thus, the underlying and supporting crushed rock bed for the sewer pipe was to occupy the lowest 15 inches of this trench.

The bottom of the trench box in question, when observed by Mr. Smith, was approximately 3 feet from the bottom of this trench. Thus, in Mr. Smith's opinion, the lowest 3 feet of the sides of this trench were not "shored, sheeted, braced, sloped or otherwise supported by means of sufficient strength to protect the (two) employees working within them." (Item No. 1 - Citation).

Further, as observed and photographed by Mr. Smith, the trench in question did not have a ladder in it for use by employees to enter and exit the trench. Thus Mr. Smith opinioned that Respondent "failed to assure . . . an adequate means of exit (by means of) a ladder or steps . . .," from this trench. (Item No. 2 - Citation). See photographs, Exhibits C-2, C-3, C-8.

Mr. Smith was concerned that the 3 foot unshored bottom section of the trench walls might collapse and the trench box might then move downward injuring the two employees, or, the employees climbing in and out of the trench by using the horizontal beam supports on the inside

of the trench box sides, might displace the trench box. Further, in his view, the employees, using this method of ingress and egress from the trench were being subjected to a falling hazard as the horizontal beams were in whole or in part covered with soil (See Exhs. C-2, C-3) which would interfere with adequate hand and foot holds. Further, the top of the trench box did not extend above ground level at the top. Thus, employees would have to crawl from the top of the trench box, about 1 foot, to ground level. Safe and adequate exit at either end of the trench was not possible because such an exit path would bring the employees into completely unshored sections of the trench.

The foregoing facts are not in dispute. The type of soil in which this trench was excavated is in dispute, Mr. Smith classifying it as "unstable or soft," Respondent's witnesses describing it as "stable, hard or compact." No soil tests were conducted by either party.

However, whether the soil at this worksite was "unstable or soft," or "hard or compact" need not be determined here.

The Standard cited by Complainant in Item No. 1 of the Citation herein, clearly requires the sides of trenches "in unstable or soft material, 5 feet or more in depth . . ." to be shored, sheeted, braced, sloped or otherwise supported to protect employees working therein. 29 C.F.R. 1926.652(b).

The Standard set forth at 29 C.F.R. 1926.652(c) clearly provides that "Sides of trenches in hard or compact soil, . . . shall be shored or otherwise supported when the trench is more than 5 feet in depth and 8 feet or more in length. * * *"

Thus the Standards setting forth "Specific Trenching Requirements" (29 C.F.R. 1926.652) unequivocally provide that sides of trenches 5 or more feet in height must be adequately protected.

The evidence here conclusively establishes that although the trench here involved was 14 feet 5 inches deep, ten feet of the sides thereof were adequately shored and supported by the massive trench box which had been installed. The lower 3 feet of the trench sides were not shored or supported, as the trench box was not driven to the bottom of this trench.[3/] However, the cited Standard does not require shoring of trench walls 3 feet in height.[4/] Shoring is required only when 5 or more feet of exposed trench sides or walls are present with employees working therein.

It is therefore concluded that the evidence of this record does not establish the violation set forth in Item No. 1 of the Citation herein.

As to Item No. 2, the absense of "a ladder or steps" as a means of exit from this trench, the evidence does establish this violation.

The Standard cited mandates that ". . . in trenches 4 feet deep or more, an adequate means of exit, such as a ladder or steps, shall be provided and located so as to require no more than 25 feet of lateral travel." 29 C.F.R. 1926.652(h)

---

[3/] The trench box was intentionally not driven to the extreme bottom of the trench to accommodate the installation of the crushed stone base for the pipe and to avoid movement of the base and pipe when the box was removed for reinstallation at the next required location.

[4/] The evidence reveals that the top 1 foot of the sides of the trench in question were sloped back at or near the angle of repose. (TR. 150).

The evidence conclusively establishes that there was no "adequate means of exit" at either end of this 35 foot long trench. If employees were to use either end to exit the trench, they would be exposed to the completely unshored or unprotected side walls of this trench at those locations, which were in excess of 5 feet in height. (See Exhs. C-2, C-3, C-6 and C-8).

It was the practice of the employees, working within the trench box in question, to exit the trench by climbing up the inside wall of this box, using the horizontal "I" beam supports like a ladder.

This means of exit however can not be considered "adequate" within the meaning of the cited Standard. The vertical distance between the "I" beam supports was from 2 to 3 feet. A considerable quanity of loose soil filled the space on top of the "I" beams, making hand and foot holds difficult (See Exhs. C-3, C-8). Additionally, the vertical distance from the bottom of the trench to the lowest "I" beam was from 4 to 5 feet, making the "first step" of this means of exit less than desirable or adequate. (See Exhs. C-2, C-8).

The obvious solution to this situation is to weld or permanently affix a metal ladder (having steps from 12 to 15 inches apart) or hand and foot holds, to the inside of the trench box, with perhaps a 3 foot section thereof hinged so that it might be swung downward to the trench bottom. Evidently Respondent has so equipped some of its trench boxes (TR. 215).

As to the penalty for the nonserious violation herein found to exist as set forth in Item No. 2 of the Citation, the Respondent is a medium sized company in the heavy construction industry in the area, with about

32 employees. Its gross revenues for 1974 was approximately three million dollars. No injuries are associated with this violation which is considered to be of medium gravity. Two employees were exposed to this inadequate exit violation.

This Respondent had previously been issued a Citation for Serious Violation of the trenching Standard set forth at 29 C.F.R. 1926.652(b) and a Citation for Nonserious Violation of the Standard set forth at 29 C.F.R. 1926.152(a)(1) (See Exh. C-7). These Citations were not contested and the proposed penalties had been paid (TR. 117-120).

Respondent, when advised by Mr. Smith of the need for a ladder in the trench in question, obtained a ladder and put it into the trench without delay. There is no evidence impinging up Respondent's good faith.

It is therefore concluded that the proposed penalty of $75 based upon this nonserious violation is appropriate and reasonable.

Based upon the foregoing findings and conclusions and pursuant to the provisions of Sections 10(c) and 12(j) of the Act (29 U.S.C. 549(c) and 661(i)), it is hereby,

ORDERED: that

1. Item No. 1 of the Citation for Nonserious violation of 29 U.S.C. 654(a)(2) for failure to comply with the Standard set forth at 29 C.F.R. 1926.652(b), and the penalty proposed thereon are VACATED.

2. Item No. 2 of said Citation, for failure to comply with the Standard set forth at 29 C.F.R. 1926.652(h) and the penalty proposed thereon are AFFIRMED.

3. A total civil penalty in the amount of $75 is assessed.

William E. Brennan

WILLIAM E. BRENNAN
Judge, OSAHRC

Dated: October 29, 1975
Hyattsville, Maryland

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

February 17, 1976

CERTIFIED # 647951
RETURN RECEIPT REQUESTED

IN REFERENCE TO SECRETARY OF LABOR v.

Mohawk Excavating, Inc.

OSAHRC DOCKET NO. 8845

NOTICE IS HEREBY GIVEN TO THOSE LISTED BELOW:

FOR THE SECRETARY OF LABOR

- Albert H. Ross, Regional Solicitor
  U. S. Department of Labor
  JFK Federal Building
  Government Center-Room 1607
  Boston, Mass. 02203

OF COMMISSION ORDER

To wit: SEE ATTACHED

FOR EMPLOYER

- Thomas C. Marshall, Esq.
  Weber & Marshall
  24 Cedar Street
  New Britain, Connecticut 06052

FOR EMPLOYEES

-

-

William E. Brennan, Judge
Occupational Safety & Health
Review Commission
6525 Belcrest Road, Suite 1005
Hyattsville, Maryland 20782

FOR THE COMMISSION

William S. McLaughlin

WILLIAM S. McLAUGHLIN
EXECUTIVE SECRETARY

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>MOHAWK EXCAVATING, INCORPORATED,<br>Respondent. | OSHRC DOCKET NO. 8845 |
| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>DESARROLLOS METROPOLITANOS, INC.,<br>Respondent. | OSHRC DOCKET NO. 11884 |
| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>TEXACO, INCORPORATED,<br>Respondents. | OSHRC DOCKET NO. 11903 |

ORDER VACATING DIRECTION FOR REVIEW

Before BARNAKO, Chairman; MORAN and CLEARY, Commissioners.

BY THE COMMISSION:

Commissioner Moran has issued orders for review in these cases. The orders do not by their terms grant respondents' petitions for discretionary review, 1/ but, instead, are the type considered and rejected by this Commission in Francisco Tower Service, BNA _____ O.S.H.C. _____, CCH E.S.H.G. para. _____ (No. 4845, 1976). In addition, no other member of the Commission granted the petitions for discretionary review filed by the respondents 2/ and therefore, the petitions were denied. Accordingly, the orders for review are hereby vacated.

FOR THE COMMISSION

William S. McLaughlin

William S. McLaughlin
Executive Secretary

Dated: FEB 17 1976

1/ See Rule 91 of the Commission's Rules of Procedure, 29 CFR §2200.91.

2/ Commissioner Cleary expressly notes that he denied respondents' petitions for discretionary review since the Judges' decisions at issue contain no prejudicial error and the issues presented in respondents' petitions are either settled under Commission law or of a constitutional nature.

MORAN, Commissioner, Dissenting:

With this "order" Messrs. Barnako and Cleary continue their illegal scheme of depriving a duly appointed and qualified member of this Commission from exercising his statutory right to cause decisions of Administrative Law Judges to be reviewed. 29 U.S.C. § 661(i). They do this by adoption of this "Order Vacating Direction For Review."

Not only does this order illegally deprive a member of this Commission of a statutory right but it has no force or effect upon the parties to this case since it neither affirms, modifies nor vacates the matters placed in issue by respondents' notices of contest. Consequently, there is no final order as to those contested issues and they continue to pend before the Commission undecided.

When duly contested, there is no requirement that an alleged violation be abated nor can the Secretary of Labor collect any monetary penalties - or rely on this case to prove a prior violation - until a final order is issued. 29 U.S.C. § 659(c).

I discussed these matters at greater length, including the reasons why my colleagues are proceeding in this unusual manner, in Secretary v. Francisco Tower Service, OSAHRC Docket No. 4845, February 6, 1976, which I attach hereto as Annex I and incorporate by reference herein.

In the instant cases, my colleagues rely on the provisions of 29 C.F.R. § 2200.91(d) in asserting that "the petitions for discretionary review filed by the respondents . . . were denied." I disagree.

Section 2200.91(d) provides that:

> "Failure to act on such petition within the review period shall be deemed a denial thereof."

This section applies where no direction for review has issued pursuant to 29 U.S.C. § 661(i). That is not the case here. A timely direction was filed in each of these cases. This action tolled the 30-day statutory final order period provided for in § 661(i). Thereafter, the Commission may add additional issues at its discretion either sua sponte or upon the request of a party. See Secretary v. Worcester Pressed Steel Company, 20 OSAHRC 737 (1975).

The failure, therefore, to take specific action on a respondent's petition, which is filed after a direction for review, does not constitute a denial of the petition. Furthermore, our awareness of a party's exceptions to particular findings below before the direction is issued does not mean that we may not consider them at a later time just because such exceptions are not included in the original direction for review. Accu-namics, Inc. v. OSAHRC, 515 F.2d 828, 834 (5th Cir. 1975).

I am also constrained to comment on footnote 2 of the Commission's order which indicates that "Commissioner Cleary . . . denied respondents' petitions for discretionary review" for the reasons stated therein. This is another illustration of how my colleagues misconstrue their statutory authority. An individual member of the Commission may elect to direct review of a case, but neither one or two members collectively can deny review. The applicable statute clearly provides in unambiguous language that "any Commission member" can direct review of a case.

Finally, I note the inconsistency between this "order" - which does not affirm the Judge's decision - and the January 8, 1976 ruling of Chairman Barnako in docket number 8845 (Mohawk case), quoted in full as follows:

> "In my view Commissioner Moran's order filed herein was ineffective as a matter of law, and the administrative judge's report was final on November 28, 1975. Counsel for Respondent should be so advised." (Emphasis supplied.)

In docket number 11884 (Desarrollos case), an identical ruling was issued by him on the same day except that the date of the alleged finality of the judge's report was listed as "November 14, 1975" rather than November 28, 1975.

No explanation is given as to why it was his opinion in January that the report "was final" and the failure in February to stick with that view. Judicial opinions should be decisive and clearly enunciated so the parties will know where they stand with respect to their rights and responsibilities. The rulings in these cases are flexible, indecisive and indecipherable. In the words of Robert Southey, they are

"a perfect nonplus and baffle to all human understanding."

ANNEX I - DISSENTING OPINION IN DOCKET NO. 4212

MORAN, Commissioner, Dissenting:

This order is without force or effect since it neither affirms, modifies nor vacates the citation or proposed penalty. Consequently, there is no final order, and the issues in dispute in this case continue to pend before the Commission undecided. Until a final order has issued, there is no requirement that an alleged violation be abated nor can the Secretary of Labor collect any monetary penalties.

29 U.S.C. § 659(c) establishes the procedure for adjudicating alleged violations of the Occupational Safety and Health Act of 1970 (29 U.S.C. § 651 et seq., hereafter the Act) when a cited employer contests the citation or penalty proposal, as the respondent in this case has done. Once the employer, within the time period prescribed, "notifies the Secretary that he intends to contest," the Commission "shall afford an opportunity for a hearing." That has been done in this case. However, the statute goes on to provide as follows:

> "The Commission shall thereafter issue an order, based on findings of fact, affirming, modifying or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief, and such order shall become final thirty days after its issuance." (Emphasis supplied.)

That has not been done in this case. No final action has been taken on the citations or proposed penalties.

The above-cited provision of law is the only statutory authorization for the issuance of orders giving final disposition to a citation or proposed penalty which has been contested in accordance with § 659. Since the respondent in this case did contest this enforcement action under that section of law - and the Commission has not yet acted upon the Secretary's citation - the matters raised by respondent's notice of contest remain undecided.

Section 666(d) specifies that a respondent shall not be required to abate the alleged violation until the Commission acts on the citation. It provides that the period for correcting a violation

> "shall not begin to run until the date of the final order of the Commission." (Emphasis supplied.)

Penalties, of course, cannot be collected by the Secretary of Labor unless he can demonstrate that any dispute over their amount has been adjudicated in accordance with law. Where an order such as this takes no action on the "Secretary's citation or proposed penalties," a respondent will be legally entitled to decline any request by the Secretary for payment. Should that happen and the Secretary then proceed in court to collect payment he would be unable to prevail since he could not show any disposition of the "Secretary's citation or proposed penalties."

Another section of the Act is even more specific in this regard. § 660(b) allows the Secretary of Labor to obtain enforcement of any

"final order" of the Commission if he files a petition therefor in the appropriate court of appeals provided that no adversely affected party has filed a petition for review within 60 days of the Commission's § 659(c) order. This section goes on to provide that "the Commission's finding of fact and order shall be conclusive in connection with any [such] petition for enforcement." Here, since the Commission has made no findings of fact itself - and has not adopted the Judge's findings of fact - no petition for enforcement would lie even if this "Order Vacating Direction for Review" could qualify as a § 659(c) final order.

Nor is any appeal of this "order" permitted. The only Commission order which can be appealed is

> ". . . an order of the Commission issued under subsection (c) of section 659 . . . ." 29 U.S.C. § 660(a).

Furthermore, in appeals as well as enforcement petitions, the Act provides that there must be Commission findings of fact. In this regard § 660(a) provides that

> "The findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive."

Messrs. Barnako and Cleary have here declined to make any findings with respect to questions of fact - nor have they adopted the findings with respect to questions of fact which were made by the Judge below. Consequently, this "Order Vacating Direction for Review" prevents both

the Secretary of Labor from filing an appeal or a petition for enforcement and any other "adversely affected or aggrieved" party from obtaining a review in the Court of Appeals because of two reasons: (1) there is no § 659(c) order, and (2) there are no findings of fact.

A case for disposition by this Commission arises when a cited employer contests the complainant's enforcement action within the time prescribed. 29 U.S.C. § 659. A trial is held on the issues raised by the parties at a subsequent date before one of this Commission's Administrative Law Judges (a position which, at the time this statute was enacted, was known as "hearing examiner"). 29 U.S.C. § 661(i). That section of the law then goes on to provide that:

> "The report of the hearing examiner shall become the final order of the Commission within thirty days after such report . . . unless within such period any Commission member has directed that such report shall be reviewed by the Commission." (Emphasis supplied.)

This is the only statutory provision giving finality to an Administrative Law Judge's decision.[10/] Such a decision cannot "become the final order of the Commission" if any Commission member directs that "such report shall be reviewed by the Commission" within

---

10/ There is a parallel provision in the Administrative Procedure Act. 5 U.S.C. § 557(b) provides, in part, that ". . . the presiding employee . . . shall initially decide the case . . . . When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is . . . review on motion of the agency within time provided by rule." (Emphasis supplied.)

the time prescribed. See Secretary v. Gurney Industries, Inc., 6 OSAHRC 634, 637-641 (1973).

There is no dispute over the fact that one member of the Commission, acting pursuant to the above-stated statutory provision, directed that the Commission review the Judge's decision in this case. The Commission, however, has failed to act upon that decision. It has not reviewed the Judge's report. This "order" does not address itself to the Judge's findings in any way. It simply purports to vacate the direction for review. Furthermore, the majority neither asserts, suggests, nor implies that the "order" herewith entered has the effect of adopting the decision below.

The full text of the direction for review is stated in the Commission order except for the first paragraph thereof which provides the following:

> "Pursuant to the authority contained in 29 U.S.C. § 661(i), the undersigned hereby directs review of the decision of the Judge in the above-entitled case."

My colleagues, in effect, find that this direction for review is ineffective because of vagueness. It does not, they say, present an "issue" for adjudication by the Commission under the Act. A simple reading of the above-quoted first paragraph thereof, however, disproves that assertion. Review is directed "of the decision of the Judge." The direction puts the Judge's decision in issue. It is not limited to any portion thereof, nor indeed is there any

statute, regulation, rule, practice or decision which requires a member of this Commission to specify particular "issues" in such directions or to prevent a member from directing review of the entire decision of the Judge if that be his disposition. However, even if the direction for review specified particular "issues," the Commission's review of the Judge's decision in such a case would not be limited to the issues so specified in the direction for review. This point was made clear in Accu-namics, Inc. v. OSAHRC, 515 F.2d 828, 834 (5th Cir. 1975).[11/]

The action taken by Messrs. Barnako and Cleary in this case is nothing less than an unabashed attempt to deprive a member of this Commission of a statutory right to have a particular decision reviewed.

Congress created this agency for the single purpose of "carrying out adjudicatory functions under the Act." 29 U.S.C. § 651(b)(3). It provided that it should operate as a bi-level tribunal consisting of Administrative Law Judges who preside at trials and make the initial decisions, with review thereof by the three members of the Commission sitting as a panel to review such decisions and issue final orders. 29 U.S.C. §§ 659(c), 661(a), 661(d), and 661(i). It further provided that each of the three members

---

11/ The pertinent APA provision is 5 U.S.C. § 557(b): "On . . . review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."

> ". . . shall be appointed by the President, by and with the advice and consent of the Senate, from among persons who by reason of training, education, or experience are qualified to carry out the functions of the Commission under this Act." 29 U.S.C. § 661(a).

§ 661(b) provides that the "terms of members of the Commission shall be six years . . . ."

The Act makes only one exception to the provision that the Commission members shall operate as a collegial tribunal in carrying out its adjudicatory functions under the Act. In § 661(i) it clearly grants to "any" single member the power to require that an Administrative Law Judge's decision shall be reviewed by the tribunal.

With this order, however, Messrs. Barnako and Cleary have combined to deprive a duly appointed and qualified member of the Commission of this statutory grant of authority. They have abrogated to themselves the authority which the Act gave to someone else. They have done this to impede the free flow of ideas which inevitably springs from the collegial process. Nevertheless, even if their purpose could be truthfully regarded as sound public policy, it could not be legally accomplished because rulings articulated in Commission decisions - no matter how beneficial - cannot rise beyond the Congressional delegation in the enabling legislation. The fixing of a definite power in a statute - that of an individual member to cause the Judge's decision to be reviewed by the members of the Commission - is enough to establish the legislative intent that the power is not to be curtailed or restricted. What Congress has given cannot be

taken away by members of this Commission. The Supreme Court stated it this way in Humphrey's Executor v. U. S., 295 U.S. 602 (1935):

> "The sound application of a principle which makes one master in his own house precludes him from imposing his control in the house of another who is master there."

In the Justinian Code, this rule was expressed more succinctly: "Delegata potestas non potest delegari," which Henry Campbell Black translates as "a delegated power cannot be delegated."[12] This long-standing rule of law, however, has not deterred Mr. Barnako and Mr. Cleary from delegating to themselves what Congress has delegated to me.

Congress deliberately chose to establish this Commission with three members, and the President, by his selection of persons of diverse backgrounds to constitute the original membership, fully implemented that collegial purpose.[13] It was generally assumed that

---

12/ Black's Law Dictionary 512 (rev. 4th ed. 1968).

13/ A March 19, 1971 announcement from the Office of the White House Press Secretary included the following:

> "The President today announced his intention to nominate Robert D. Moran, James F. Van Namee, and Alan F. Burch to be members of the Occupational Safety and Health Review Commission . . . ."

The announcement went on to describe these nominees in these terms:

> Moran - "An attorney and labor arbitrator"
>
> Van Namee - "Administrator of Accident Prevention for the Westinghouse Electric Corporation in Pittsburgh since 1961"
>
> Burch - "Director of the Department of Safety and Accident Prevention of the International Union of Operating Engineers for the past six years"

During the joint hearing conducted by the Senate Labor and Public Welfare Committee on their confirmation as members of the Commission reference was made to Van Namee as "representing management" and Burch as "representing labor."

the tribunal would be truly impartial if its decisions included input from persons whose past experience had been in the business and organized labor communities with an additional member who came from neither - much in the same manner as a tripartite labor arbitration panel. It was not intended - not even contemplated - that two of the members would combine to impose a gag rule on the remaining member - thereby frustrating the purpose of having three different in-puts into all Commission decisions. Certainly from the language of the Act cited supra, the establishment of a three-member tribunal, and the President's action in constituting it as he did, it can fairly be concluded that each member was to be free to exercise his individual judgment without the leave or hindrance of any other member or any combination of other members.

I asserted earlier that the reason for this deprivation of my statutory right to cause the Commission to review a decision of an Administrative Law Judge was to "impede the free flow of ideas." At this point I will undertake to relate some reasons which lead me to this conclusion.

The action taken by my colleagues in this case is a continuation of a policy which began shortly after Mr. Barnako took office on August 1, 1975. It has been detailed in the public press. See, for example, The Washington Star, November 27, 1975 article entitled "Press Releases on Failures Helped Demote Chief of Health Unit," a copy of which is attached hereto as Appendix A. The matter was summarized by the St. Louis Labor Tribune in a January 22, 1976

editorial entitled "(Don't) Let The Sunshine In" which is quoted herewith without elaboration:

> "An OSHA official's attempts to let a little sunshine in on his record led to his replacement as captain of the Administration's Review Commission and eventually to virtual exclusion from the business conducted by his fellow commissioners.
>
> Robert D. Moran is still on the team (his term runs until 1977), but in the meantime he isn't even i ' ..u into the huddles anymore.
>
> Appointed first chairman of the commission in April 1971, Moran established a practice of publishing news releases (about five a week) on the wins and losses of his Review Commission on 'significant cases.'
>
> This pristine innocence was not acceptable to his bosses at the Labor Department who cautioned him to keep his mouth shut in late '73, nor to the superchief over at the White House, who last August 5, replaced him as Chairman of the Commission.
>
> He was replaced by a man called Frank R. Barnako, a lawyer for Bethlehem Steel, who immediately discontinued the news releases and reduced the dissemination of information about the Commission's activities to a bare minimum.
>
> But, Moran, his mind sated with the ideals of the "Freedom of Information Act," stubbornly persisted in his attempts to keep the public informed on the disposition of cases which came before the Review Commission.
>
> This, in turn, led Barnako, et. al., to illegally exclude Moran from the deliberations of the Commission and to conduct business without permitting him to participate. Moran filed suit citing 16 cases in which the Commission denied a review of an administrative law judge's decision on an OSHA complaint without informing Moran of its action.

> Foul, cried Moran and marched off to the United States District Court in Washington, D.C. declaring his rights as a public official have been abrogated and demanding that they be restored by the courts and appropriate damages be assessed against the defendants.
>
> The Labor Tribune applauds Robert D. Moran, a man who won't be muffled, and wishes him well in his litigation."

The Hartford Courant took a somewhat similar view in a December 4, 1975 editorial "OSHA Needs More Light" quoted in part as follows: 13a/

> "When it enacted the Occupational Safety and Health Act of 1970, Congress enacted a law with which it is uncommonly difficult to comply. The OSHA hierarchy is making it more difficult, even as Congress tries to correct its mistakes.
>
> * * * Frank R. Barnako, newly-appointed chairman of the OSHA Review Commission, has directed that commission decisions will no longer be published either as news releases or formal reports - both have been done in the past.
>
> The Review Commission is the 'supreme court' of a vast quasi-judicial system established to interpret OSHA regulations. Publication of its precedent-setting decisions, usually in business and technical journals, can offer useful guidance to confused employers.
>
> Mr. Barnako should reverse his no-news decision . . . ."

A December 4, 1975, editorial in the Honolulu Star-Bulletin entitled "Too Much Openness" concluded with this statement:

> "To most people, the OSHRC decisions will hardly make exciting reading, but they ought to be available to those who may be interested."

The fact that this policy of impeding the free flow of ideas is directed only at the views of one member in particular can be amply

---

13a/ The full text of this editorial appears at page S.673 of the Congressional Record for January 28, 1976 with accompanying comments

demonstrated by the unresolved cases on the dockets of this Commission. During the period June 1, 1974, through November 30, 1975, there were directions for review filed by the three members in a total of 593 cases (most of them by Mr. Cleary). In 268 of these there was no petition for review by any party.[14/] In none of these cases (except those directions issued by me) has either Mr. Barnako or Mr. Cleary proposed an order vacating the direction for review. Nor has either of them - with respect to such directions for review - taken the position that they do here:

> "If there is some appropriate reason for directing review sua sponte, the reason should be stated so the Commission may benefit from the parties' briefs on the issue."

With respect to the instant case, the majority opinion states that ". . . it has not been, nor is it now, before us on its merits." But, by their double-standard reasoning, all the directions for review filed by Mr. Cleary and former Commissioner VanNamee where no party has petitioned for review are before us on their merits.

It would be impossible to list the text of all the review-directed cases currently pending before the Commission. However three of those filed by Mr. Cleary in cases where no petition for review was filed by any party are herewith noted. In Secretary v. Alfred S. Austin

---

13a/ by Senator Lowell Weicker, quoted partially as follows: ". . . the decision of the Occupational Safety and Health Review Commission to cease publication of their rulings . . . cannot but adversely effect the fair administration of the law."

14/ In excess of 45% of all directions for review were issued in cases where no party petitioned for review. Contrast this actual experience with the assertion in the majority opinion that directions for review are "largely" in response to petitions for discretionary review filed by the parties.

Construction Co., OSAHRC Docket No. 4809, and Secretary v. Fisk Oesco Joint Venture, OSAHRC Docket No. 4654, the direction for review asked only "[w]hether the Administrative Law Judge committed reversible error." In Secretary v. John T. Clark & Son of Boston, Inc., OSAHRC Docket No. 10554, the direction for review asked only whether the Administrative Law Judge erred in vacating the citation alleging non-compliance with the standard at 29 C.F.R. 1918.105(a)." There is, of course, no difference whatsoever between a sua sponte direction for review questioning whether the judge erred in his decision and one like that here under consideration which simply directed the judge's decision for review so that its findings of fact and conclusions of law could be reviewed by the members.

Another indication that this action of Messrs. Barnako and Cleary is part of a continuing attempt to prevent the views of this member from being included in Commission decisions is the 16 previous cases in which they issued an "Order Vacating Direction for Review." As mentioned in The Washington Star article (attached as an exhibit hereto) and the above-quoted editorial in the St. Louis Labor Tribune, all 16 of those "orders" were issued by my colleagues without any notice to me that they were under consideration. After they had been typed, and signed by my fellow Commission members, they were not circulated to me prior to their release to the parties so that my views could be appended thereto - a total departure from the practice which has been in effect for every decision ever issued by this Commission prior to

the day Mr. Barnako became the Commission's Chairman.[15/] It is my belief that a similar "procedure" would have been employed in many additional cases were it not for my initiation on November 25, 1975 - the day I learned of these "orders" - of a Petition in the U.S. District Court for the District of Columbia to put a stop to it. This matter is also mentioned in the newspaper articles referred to supra.

The very fact that the majority is proceeding in this case in this most unusual manner - vacating the direction for review rather than affirming the decision of the judge - is additional evidence that their purpose is to prevent my views on the issues arising in this case from being included in the Commission's decision. They apparently would prefer to have no decision - to have this and similar cases pend in limbo for infinity - rather than to have a decision in which I could participate.

I note the following language in the majority opinion:

> ". . . if Commissioner Moran's orders for review were permitted to stand, it would act as a stay of abatement and, in those instances where the Secretary's citation has been affirmed, would permit a hazardous condition to continue unabated - a result clearly contrary to the purposes of the Act."

---

15/ In order to insure that I would be kept in the dark about the issuance of these orders a written notice had to be given to the Executive Secretary from Mr. Barnako (who is his immediate superior) because the Executive Secretary would not otherwise have mailed the orders to the parties until he saw that all three members had participated in these decisions. That written notice specified that I was not to be allowed to participate in those 16 decisions.

As noted at the outset of this dissenting opinion, this "Order Vacating Direction for Review" does exactly what they say would happen if my "order for review were permitted to stand." But, let's further examine this quoted assertion! Where are those "instances where the Secretary's citation has been affirmed?" Who has "affirmed" them? Surely the Commission members have not done so. If it was their disposition to affirm, they would have said so. On the other hand, the Act makes it crystal clear that a Judge's decision could not affirm the Secretary's citation if - as has happened in the case now before us - a Commission member has directed review thereof within thirty days of its issuance. 29 U.S.C. § 661(i). So, in their desperate attempt to prevent one member of the Commission from exercising his statutory rights, Messrs. Barnako and Cleary have created the very monster they claim will result from my direction for review - they "permit a hazardous condition to continue unabated."

Of course there is a very simple and quick way to avoid this from happening. They can adopt a one-sentence order affirming the decision of the Administrative Law Judge. This would avoid their concern about "an unnecessary delay of the proceedings" and indeed could be done quite quickly and simply - a rubber stamp would serve this purpose rather nicely. Certainly they will concede that this procedure I suggest could be accomplished much more rapidly than

the adoption of this "Order Vacating Direction for Review" and it would avoid all the problems I've mentioned in this opinion which result from the absence of a final disposition of the merits of this case.

It would be remiss of me, however, if I failed to note the hollow ring that surrounds my colleagues' assertion that they will "continue" to r[illegible] any "unnecessary delay of the proceedings."[16/] I had occasion to respond to a question on this Commission's backlog which was addressed to me during hearings conducted by the Senate Committee on Appropriations on June 25, 1974. I answered with the following words:

> "The members of the Commission have about 400 undecided cases backed up. The reason for this is that the members are not deciding cases expeditiously and are directing cases for review at about three times their rate of disposition. During the first four months of 1974, the Commission members decided a total of 39 cases. During that same period they directed 140 cases for review.
>
> At the time former Commissioner Alan Burch's term expired in April 1973, there was a backlog of 228 undecided cases. His replacement announced that his No. 1 priority was a reduction in that backlog. However, in April 1974 there had been an increase in the backlog of more than 60 percent - making a total of 367 undecided cases. The number has gone up since then.
>
> At the time Commissioner Cleary announced that backlog-reduction was his top priority. I asked him to join me in a rule which would automatically affirm

16/ In this connection see my dissenting opinion in Secretary v. Trustees of Penn Central Transport Co., OSAHRC Docket No. 5796, December 22, 1975 for a specific instance where a Commission member delayed the issuance of a decision for reasons totally unrelated to the merits of the case under consideration.

> a Judge's decision if it had been called for review but had remained before the Commission for three months or more without action. He declined. I cannot get either of the other members to put such a rule into effect or set any time limit for action by the members of the Commission. Consequently, the backlog continues to grow and cases are sitting before us for one and a half to two years without final decision.
>
> In all honesty, I see no prospect for reducing this backlog during fiscal year 1975 unless there are membership or legislative changes. On the contrary, I fully expect to see it increase. At this time next year it will exceed 600 cases if the existing situation continues." Senate Hearings Before the Committee on Appropriations, Departments of Labor, Health, Education, and Welfare, and Related Agencies Appropriations, H.R. 15580, 93d Congress, 2d Session, at pages 4571-4572.

There was, of course, a subsequent membership change when Mr. Barnako became a member in place of Mr. Van Namee whose term expired on April 27, 1975. At the time Mr. Barnako was sworn into office on August 1, 1975, the backlog stood at 454 cases. Five months later - on December 31, 1975 - it had grown to 540 cases. My first act upon swearing him into office was to hand him a written proposal that he join me in a rules change which would set a time limit on actions by Commission members on review-directed cases. Mr. Cleary was given a copy of that proposal on the same day. No response to that proposal has yet been made - nor has any counter proposal been offered.

I submit that the above discussion indicates how quick my colleagues have been in the recent past to reject the "unnecessary delay of the proceedings" of this Commission.

Candor enjoins me to concede that part of the reason for the recent increase in the backlog results from the high number of Judge's decisions which I have directed for review in the past few [illegible]. It is obvious from the comments in the majority opinion that my colleagues do not agree with me that many of those cases ought to be reviewed by the Commission. They are, of course, perfectly within their rights in taking this view. However, that being so, there is no reason why these cases should remain in the backlog. They could affirm any Judge's decision I directed for review within thirty days of my action.[17/] Neither these cases - nor any other cases - should be permitted to languish interminably without decision. I continue to urge the adoption of a rule of procedure setting a time-limit on actions by this Commission on review-directed cases.[18/]

---

17/ When a Judge's decision is directed for review the Administrative Procedure Act requires that parties to the case be given a "reasonable opportunity" to submit briefs, exceptions, and proposed findings and conclusions to the Commission members before the members make their decision. 5 U.S.C. § 557(c).

18/ If either Mr. Cleary or Mr. Barnako wishes to add meaning to the lip-service they pay to the need for "speed of adjudication" (see their citations to Senator Javits' comments and to 5 U.S.C. § 555(b) in their majority opinion in this case), they could do so by joining me in setting a deadline for the resolution of all review-directed cases. Currently, the average time for disposition of review-directed cases exceeds two years from the date an employer contests a citation to the date of the § 659(c) final order. It is rapidly creeping toward the three-year mark.

There are other matters in the majority opinion which also merit further discussion.

After delivering their lecture on the evils of sua sponte directions for review, Messrs. Barnako and Cleary later state:

> ". . . our action here should not be interpreted as barring sua sponte orders of review by members of the Commission."

The clear import of this is that when Mr. Moran directs review in such a manner it is "improvident" and "detrimental" but when Mr. Barnako and Mr. Cleary does so, it is "in the public interest." Somehow this brings to mind H. L. Mencken's definition of a Judge as "a law student who marks his own examination papers."

The majority opinion also contains a rather amusing attempt at "bootstrapping" in the discussion equating directions for review with a writ of certiorari. They quote one "commentator" (William Fauver, a Department of Interior Administrative Law Judge) as noting that petitions (not directions) for "discretionary review" are "quite similar" to the procedure at law known as certiorari. They then go on - discarding the "quite similar" nomenclature in the process - to find that since the direction for review does not meet the criteria for issuance of a writ of certiorari, it is "not authorized by law." This kind of "logic" could equally be used to prove that Messrs. Barnako and Cleary are really justices of the United States Supreme Court or members of the Holy Trinity.

However, it is clear that William Fauver is neither an authority on certiorari nor does he pretend to be and not even he - or anyone else - said that the statutory right of a member of this Commission to cause a decision by one of this agency's Administrative Law Judges to be reviewed by this three-member tribunal was conditioned upon the presence of the same criteria as that which constrains a high court in the exercise of its power to cause a lower court to send up its decisions for examination. If anyone were to attempt to establish this principle I submit that they would find it impossible to equate with the common law writ of certiorari what the majority in this case concedes to be a "short clause, fewer than twenty words . . . [containing] the only mention of this statutory power in the entire Act."

I must confess to being mystified by the reference in the majority opinion to "section 8(a) of the APA" and the assertion that the direction for review issued in this case "is contrary to the intent" of that section. The Administrative Procedure Act was codified as part of Title 5, United States Code, some ten years ago (see public law 89-554, 80 Stat. 378) so the provision of law to which reference is made is 5 U.S.C. § 557(b). I took cognizance of this provision in note 11 supra and the accompanying text. Briefly, this provision of law merely provides that when a direction for review of a Judge's initial decision has been issued the Commission

then has the same power to act as did the Judge - except where the authority ordering the review specifically limits the scope thereof. The exception, of course, has no application in the matter now before us because the entire decision below was directed to be reviewed.

The concluding portion of the majority opinion in this case contains another instance where Messrs. Barnako and Cleary assume power never given to them. I quote them as follows:

> "Indeed, the Courts have kept us mindful of our responsibility in the public interest to provide 'active and affirmative protection' to the working men and women of the nation and to perform a policy-making function in the application of the Act as intended by Congress. Brennan v. O.S.H.R.C. and John J. Gordon Co., 492 F.2d 1027, 1032 (2d Cir. 1974); Brennan v. Gilles & Cotting, Inc. and O.S.H.R.C., 504 F.2d 1255, 1262 (4th Cir. 1974)."

Neither of these cases support the broad assertion for which they are cited. They don't even come close. In the latter-cited case, at page 1262, the Court noted that the Secretary of Labor was seeking to overturn a ruling of this Commission that a prime contractor was not jointly liable with one of its subcontractors for a safety infraction. The Secretary argued that the Commission had no right to determine this issue for the issue concerned only enforcement policy on joint contractor liability, a matter which "should be committed to his discretion, not that of the Commission." The Court rejected that argument with the following statement:

> "To accept the Secretary's position would mean that the Commission would be little more than a specialized jury charged only with fact finding. But, as we read the statute, the Commission was designed to have a policy role and its discretion therefore includes some questions of law."
>
> * * *
>
> ". . . Congress intended that this agency would have the normal complement of adjudicatory powers possessed by traditional administrative agencies."

There is nothing in this case which supports the quotation from the Barnako-Cleary opinion for which it is cited.

In the other cited authority, the Gordon case, the Court was concerned with a decision of this Commission which barred an Administrative Law Judge from reopening a hearing on his own motion in order to take evidence on jurisdiction under the Commerce Clause. The Court reversed the Commission and held that the Judge acted properly. It then added the following comments concerning the reopening action of the Judge (at 1032):

> "The action of the Administrative Law Judge was in line with Judge Hays' well-known admonition to the Federal Power Commission that its role [the FPC's role] as representative of the public interest . . . ." (Emphasis supplied.)

The Court then quotes what Judge Hays said about the Federal Power Commission in Scenic Hudson Preservation Conf. v. F.P.C., 354 F.2d 608, 620 (2d Cir., 1965). Picking up where I left off in the Gordon case, the Court continues that the Federal Power Commission's role as representative of the public interest

> ". . . does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the [Federal Power] Commission."

Surely the majority is not claiming that this Commission which was given only a single function to perform ("carrying out adjudicatory functions under the Act")[19] has the broad scope of regulatory powers Congress granted to the Federal Power Commission under the Federal Power Act[20] and the Natural Gas Act[21] or that the quoted reference in the Gordon case transposed the authority of this Commission from an adjudicatory agency into a protector of the public interest. The Ninth Circuit specifically rejected such a result in Dale M. Madden Construction Co., Inc. v. Hodgson[22] with these words:

> "Unlike the NLRB and the FTC, [the Occupational Safety and Health Review Commission] has neither prosecution nor enforcement powers. Those have been exclusively delegated to the Secretary [of Labor].
>
> Policy making is arguably a by-product of the Commission's adjudication. But the Act imposes policy-making responsibility upon the Secretary, not the Commission . . . . The administrative procedure limits the Commission to adjudication."

---

19/ 29 U.S.C. § 651(b)(5)
20/ 16 U.S.C. §§ 791a - 825r
21/ 15 U.S.C. §§ 717 - 717w
22/ 502 F.2d 278, 279-280 (9th Cir. 1974)

I submit that the foregoing discussion demonstrates that the majority is once again resorting to "bootstrapping" in an attempt to arrogate to itself policy-making powers which it simply does not have.

I conclude this opinion (and I apologize for its length but ask indulgence on the grounds that I am being divested herein of a very ba.. statutory power) with the observation that Commission members - just as all other persons - intend the natural consequences of their acts. Obviously Messrs. Barnako and Cleary have no intention in this case of affirming, modifying or vacating the decision which was rendered by the Administrative Law Judge. Surely they would have said so if that was their intention. Their failure to take any action on the Judge's decision - or on the Secretary's citation or penalty proposal - is what is causing the real delay in the enforcement of this Act. This "order" is clearly in error.

# Press Releases on Failures Helped Demote Chief of Health Unit

By David Pike
Washington Star Staff Writer

Robert D. Moran was reasonably happy and secure for the first several years of being chairman of the three-member Occupational Safety and Health Review Commmission, after being appointed when it came into existence in April 1971.

Moran, a lawyer with experience in labor matters both in the private sector and with the government, had a six-year presidential appointment and a salary in the high-$30,000 range with the commission, which serves as the "court system" for the Labor Departmment's Occupational Health and Safety Administration (OSHA).

But then in late 1973, it started to become apparent "that the Labor Department didn't like me," Moran said yesterday. And the situation has become so bad lately, Moran charged in a suit filed this week in U.S. District Court, that the two other commissioners and the body's executive secretary have recently been making decisions without even telling him.

**MORAN SAID** yesterday that the situation began to deteriorate when he was called in late 1973 by an undersecretary to then-Labor Secretary Peter Brennan and told that "the boss doesn't like the press releases" and that "heads could roll in such a situation."

At issue were releases, as many as five a week, that reported decisions by the commission's 42 hearing judges and three commissioners on "significant" cases involving alleged safety violations by employers.

The releases reported the outcome, regardless of whether OSHA had won or lost the case, and Moran said that OSHA was losing about half the cases and didn't like the publicity. Headlines on releases, such as "Labor Department Loses Attempt to Enforce Safety Standards," probably didn't help, Moran recalled, but he persisted anyway.

Then early last year, Moran said, he was called by a personnel aide at the White House and told that he shouldn't offend the bosses at Labor and that he "was putting himself in a bad position."

"But I said that I felt it was in the public interest to report what we were doing, to let the public, the trade associations and the unions know about the law in this area," Moran said.

**BECAUSE HE** continued to issue the press releases, and because of some speeches he made to trade groups, Moran said, "I think I was slated to be dumped as chairman in the summer of 1974, but then President (Richard M.) Nixon resigned and things were held up."

Then last summer, one of the other commissioners resigned and Frank R. Barnako, a lawyer for Bethlehem Steel, was appointed by President Ford to fill the slot. "He was sworn in by me on Aug. 1, and I went off to the American Bar Association convention in Montreal," Moran said.

While in Montreal, Moran was informed that Ford had designated Baranko to be the commission chairman and that he was now just a commissioner. "I guess I was sort of Schlesingered out of my job," Moran said with a chuckle, referring to the recent shakeup at the Defense Department.

On his first day as chairman, Baranko eliminated the frequent and detailed press releases, Moran said, and now the commission merely offers a brief mention of selected cases about every three weeks.

Baranko also discontinued the official report of the commmission's activities that was printed by the Government Printing Office, and the reporting is now left to the private journals that cover the commission, Moran said. He added that this procedure concerned him, "because under the Freedom of Information Act, if you don't publish a decision, it can't be used as a precedant in other cases."

**THE NEW** situation did not deter Moran, and it led to the suit he filed this week. "To circumvent the procedure, I began using my authority as a commissioner to order a review of a hearing judge's decision, because decisions of the commission get published," Moran said.

Most of the thousands of cases sent to the commission are resolved by the judges, whose decisions are final unless a commission review is ordered within 30 days. Moran said that once the commission reviews a ruling, he also has the opportunity to include his own comments in the review and in the published order.

Cited in his suit is a case in which he ordered a review of a judge's ruling and in which, Moran charged, the other two commissioners and the body's executive secretary vacated his order "without his knowledge."

The suit charges that since Aug. 5, when Baranko became chairman, there have been "at least 15 other cases" in which Moran has been overruled by the others without telling him. The suit added that "plaintiff (Moran) believes that there may be more cases which have been disposed of in the same manner . . . but he has been unable to identify the same because of efforts by the defendants to keep such information from plaintiff."

Named as defendants are Branako, Commissioner Timothy F. Cleary and Executive Secretary William S. McLaughlin. Baranko was out of town late yesterday and could not be reached for comment. Inquiries to the other defendants were handled by the commission's public information office, which said there would be no comment "because it would not be proper in view of the pending litigation."

**AT A HEARING** earlier yesterday before U.S. District Judge June L. Green, on a request by Moran for an emergency order blocking further such alleged abuses of his review authority, Moran sat at one table, with the defendants and their lawyers seated sternly at another. But any possible fireworks were avoided when Asst. U.S. Attorney Gil Zimmerman, representing the defendants, suggested a written agreement pending a full hearing on Jan. 7.

The agreement said that Moran will be informed of all commission actions and will be given an opportunity to participate in all decisions pending the hearing.

Moran, 44, who lives in Northwest Washington, said later that the situation was really quite amicable. "They just attempted to get away with something, and I'm showing them that I have some recourse," Moran said.

He summed up the situation by stating: "It's a power play, I think. It's an attempt to circumvent the public display of our views, to push through one-sided opinions without public scrutiny and news releases."

Asked about his future on the commmission in view of all the trouble, Moran replied: "I'm fine. I'm here until April 27, 1977. I don't intend to stay one day longer, and I never intended to stay beyond the six years. I guess that's why I've been so independent while I've been here."

Service certified, by U.S.
Mail with proper postage, properly
addressed to: Wm S. McLaughlin
OSHRC Exec Sec'y
Washington, DC.

Wm J. Kilberg
Secretary of Labor
Washington, DC 20210

Nancy L. Southard, Atty
Department of Labor
Washington DC

Thomas C Marshall
Atty for Petitioner